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No. 95-618

IN THE

Supreme Court of the United States

October Term, 1995

T.B.D., a child,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

On Petition for Writ of Certiorari to the Florida Supreme Court

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BRIEF IN OPPOSITION OF RESPONDENT STATE OF FLORIDA

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QUESTION PRESENTED

Petitioner presents the following question (Pet. I):

WHETHER THE DECISION OF THE FLORIDA SUPREME COURT UPHOLDING A STATUTE, § 876.18, FLORIDA STATUTES, PROHIBITING *CROSS BURNINGS* IS DIRECTLY CONTRARY TO THIS COURT'S DECISION IN *R.A.V. V. CITY OF ST. PAUL*, __ U.S. __, 112 S. CT. 2538, 120 L. ED. 2D 305 (1992), AND OTHER STATE COURT DECISIONS WHICH HAVE INVALIDATED CROSS BURNING LAWS; AND VIOLATES THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION BECAUSE IT IS A CONTENT-BASED REGULATION WHICH PUNISHES ONLY ONE TYPE OF EXPRESSIVE CONDUCT, INSTEAD OF BEING A NEUTRAL LAW WHICH PUNISHES ALL OTHER SIMILAR TYPES OF EXPRESSIVE CONDUCT WITH DIFFERENT POLITICAL MESSAGES?

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BRIEF IN OPPOSITION OF RESPONDENT STATE OF FLORIDA

OPINIONS BELOW

The decision of the Supreme Court of Florida is reported in *State v. T.B.D.*, 656 So. 2d 479 (Fla. 1995), (Pet.App. A). The decision of the District Court of Appeal of Florida, First District, is reported in *State v. T.B.D.*, 638 So. 2d 165 (Fla. 1st DCA 1994), (Pet.App. B).

JURISDICTIONAL STATEMENT

This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The statutes and constitutional provisions involved are the First Amendment to the United States Constitution, which provides, in part:

> Congress shall make no law . . . abridging the freedom of speech,

The First Amendment is applicable to the States through the Fourteenth Amendment.

Section 876.18, Florida Statutes (1993), which prohibits the unauthorized burning of a cross on another person's private property, provides as follows:

> Placing burning or flaming cross on property of another. — It shall be unlawful for any person or persons to place or cause to be placed on the property of another in the state a burning or flaming cross or any manner of exhibit in which a burning or flaming cross, real or simulated, is a whole or part without first obtaining written permission of the owner or occupier of the premises to so do. Any person who violates this section commits a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083.

STATEMENT OF THE CASE

T.B.D. was charged with violating § 876.18, Florida Statutes (1993), by erecting a burning cross on the property of Atef Abdul-Nour. The trial court granted a motion to dismiss, holding that § 876.18 was unconstitutional under the First Amendment. The State appealed to the District Court of

Appeal, First District. On June 14, 1994, the First District issued an opinion affirming the trial court's dismissal and holding that § 876.18 is unconstitutional under the First Amendment. *State v. T.B.D.*, 638 So. 2d 165 (Fla. 1st DCA 1994). The State appealed to the Supreme Court of Florida.

On June 15, 1995, the Florida Supreme Court issued an opinion reversing the First District's decision and finding that § 876.18, Fla. Stat. does not violate the First Amendment as interpreted by this court in *R.A.V. v. City of St. Paul*, __ U.S. __, 112 S. Ct. 2538, 120 L. Ed. 2d 305 (1992).

STATEMENT OF THE FACTS

The constitutional challenge to § 876.18, was an attack on the facial validity of the statute. Consequently, the only facts included in the record in this case are that the State of Florida charged T.B.D. with violating § 876.18 by placing a flaming cross on the property of Atef Abdul-Nour in Jacksonville, Florida, on August 2, 1993, without written permission.

REASONS FOR DENYING THE WRIT

THE FLORIDA SUPREME COURT'S DECISION DOES NOT CONFLICT WITH THIS COURT'S DECISION IN R.A.V. V. CITY OF ST. PAUL

T.B.D.'s challenge to the constitutionality of § 876.18, Florida Statutes is based on his assertion that the Florida Supreme Court's decision conflicts with this Court's decision in *R.A.V. v. City of St. Paul*, __ U.S. __, 112 S. Ct. 2538, 120 L. Ed. 2d 305 (1992). In *R.A.V.*, this Court found unconstitutional a statute which prohibited expressive conduct, on both public and private property, which was offensive to others based on race, color, creed, religion, or gender. Al-

though the Minnesota Supreme Court construed the statute as prohibiting only "fighting words" based on those categories, *In re Welfare of R.A.V.*, 464 N. W. 2d 507, 510-511 (Minn. 1991), *rev'd*, 505 U.S. __, 112 S. Ct. 2538, 120 L. Ed. 2d 305 (1992), this Court held that such a construction could not save the statute from constitutional attack because it was a content-based restriction of speech which was not necessary to serve a compelling state interest. *R.A.V.*, 120 L. Ed. 2d at 325-26. *R.A.V.* did not hold that cross burning is always expressive conduct. Rather, under some circumstances, such conduct is expressive and cannot be prohibited under a statute aimed at particular categories of "fighting words."

The statute in the instant case is distinguishable from the statute in *R.A.V.* because it is restricted to cross burning on the private property of another without permission, is aimed at conduct rather than expression, and serves a compelling state interest. The private property of other persons does not constitute a First Amendment forum. This Court has identified three types of fora which may implicate First Amendment concerns: the traditional public forum, the public forum created by government designation, and the nonpublic forum. *Cornelius v. NAACP Legal Defense and Educational Fund, Inc.*, 473 U.S. 788, 105 S. Ct. 3439, 87 L. Ed. 2d 567 (1985); *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 103 S. Ct. 948, 74 L. Ed. 2d 794 (1983); *Lehman v. City of Shaker Heights*, 418 U.S. 298, 94 S. Ct. 2714, 41 L. Ed. 2d 770 (1974)(nonpublic forum actually owned by government). The public forum would include private property which is open to the public. *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308, 88 S. Ct. 1601, 20 L. Ed. 2d 603 (1968). However, the private property of another person which is not open to the public does not constitute a First Amendment forum. Thus, there is *no* right to expression on the private property of another person without that person's consent. Therefore, § 876.18, Florida Statutes does not

implicate the First Amendment and the decision of the Florida Supreme Court does not conflict with this Court's decision in *R.A.V.*

Even if the First Amendment does extend to private property, the Florida Supreme Court's decision does not conflict with *R.A.V.* because cross burning as prohibited by § 876.18 does not constitute expressive conduct. Although cross burning can often constitute expressive conduct, such is not the case when the cross burning takes place on the private property of another person without that person's permission. While cross burning has long been recognized as a symbol of the Ku Klux Klan and is often understood as expressing a view of racial superiority or hatred of minorities, when such activity takes place on another person's property without permission, the conduct does more than merely express one's racial beliefs. It conveys an unlawful threat of physical violence, as well as exhibits a clear violation of the law of trespass. Because a threat of physical violence constitutes conduct, not an "expression of ideas," it can properly be prohibited by the State. See, *United States v. Lee,* 935 F. 2d 952, 955-56 (8th Cir. 1991)("Intimidation by threats of physical violence is not protected by the first amendment.")(citations omitted); *Watts v. United States,* 394 U.S. 705, 707, 89 S. Ct. 1399, 1401, 22 L. Ed. 2d 664 (1969)("What is a threat must be distinguished from what is constitutionally protected speech."); *United States v. Orozco-Santillan,* 903 F. 2d 1262, 1265-66 (9th Cir. 1990)("A 'true' threat, where a reasonable person will believe he will be subjected to physical violence upon his person, is *unprotected* by the first amendment.")(emphasis added); *Masson v. Slaton,* 320 F. Supp. 669, 672 (N.D. Ga. 1970)("The right to free speech . . . entitles an individual to advocate certain ideas regardless of their popularity, but does not extend to the threatening of terror, inciting of riots, or placing another's life or property in danger."). Moreover, threats are violent conduct and entitled to no First Amendment protec-

tion. See, *NAACP v. Claiborne Hardware Co.,* 458 U.S. 886, 933, 102 S. Ct. 3409, 73 L. Ed. 2d 1215, 1249 (1982)("Violent conduct is beyond the pale of constitutional protection."); *Roberts v. United States Jaycees,* 468 U.S. 609, 628, 104 S. Ct. 3244, 82 L. Ed. 2d 462, 478 (1984)("[V]iolence or other types of potentially expressive activities that produce special harms distinct from their communicative impact...are entitled to *no* constitutional protection.")(citations omitted; emphasis added).

Section 876.18 differs from the statute at issue in *R.A.V.* because § 876.18 prohibits cross burning only in circumstances where such activity is clearly violent and threatening conduct rather than an expression of ideas. The statute at issue in *R.A.V.* prohibited activities such as cross burning when the activity constituted "fighting words," i.e. words likely to result in violence by the person to whom they are directed. *Chaplinsky v. New Hampshire,* 315 U.S. 568, 573, 62 S. Ct. 766, 770 (1942). Thus, the statute in *R.A.V.* focused on the victim's reaction to the expression of offensive ideas, rather than the actor's threatening conduct. In contrast, § 876.18 focuses on the conduct of the actor and does not prohibit cross burning when such activity is used to express a message, no matter how offensive that message may be, nor how observers may react to the message.

The fact that § 876.18 prohibits only a specified racially motivated threat does not render the statute unconstitutional. It is permissible to regulate crimes motivated by racial prejudice. See, *Wisconsin v. Mitchell,* 508 U.S. __, 113 S. Ct. __, 124 L. Ed. 2d 436 (1993). Section 876.18, Florida Statutes, prohibits the racially motivated actions of trespassing on another person's property without permission to engage in the threatening conduct of burning a cross. Burning a cross on someone else's property without permission is a crime motivated by racial prejudice.

Section 876.18, Florida Statutes, prohibiting entry onto another's property for purposes of engaging in a particular racially motivated act without the property owner's permission, is simply a form of trespass statute aimed at protecting the rights of property owners. Thus, § 876.18 is aimed at non-expressive conduct and does not violate the First Amendment. The action of entering the private property of another person and burning a cross is clearly conduct motivated by racial prejudice and can be prohibited under *Mitchell.*

Section 876.18, Florida Statutes, is also valid as a statute designed to protect the property and housing rights of citizens of the State. Statutes which prohibit intimidation or interference with the housing rights of others based on their race are constitutionally permissible because they punish particular racially motivated actions, not the beliefs of the actor. See, *United States v. Stewart,* 9 Fla. L. Weekly Fed. C553, C557 (11th Cir. October 3, 1995). Unauthorized burning of a cross in another person's yard certainly constitutes such intimidation or interference. *Stewart.* Section 876.18, Florida Statutes, protects the housing rights of citizens of the State. Chapter 876, Florida Statutes (1993), is entitled "Criminal Anarchy, Treason, and Other Crimes Against Public Order," and is clearly aimed at protecting Florida citizens against anarchy, treason, and terrorism. See, *State v. T.B.D.,* 656 So. 2d 479, 480 (Fla. 1995). "The statute is a legitimate legislative attempt to protect Floridians of every stripe from a particularly reprehensible form of tyranny." *T.B.D.,* 656 So. 2d at 482.

For the same reasons that the Florida Supreme Court's decision does not conflict with this Court's opinion in *R.A.V.,* it also does not conflict with the decisions in *State v. Ramsey,* 430 S. E. 2d 511 (S.C. 1993) and *State v. Sheldon,* 629 A. 2d 753 (Md. Ct. App. 1993). The statutes in both *Ramsey* and *Sheldon* applied to both public and private property and thus were not limited to situations involving the violent

conduct of trespassing onto another person's property for the purpose of engaging in threatening conduct.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari to the Supreme Court of Florida should be denied.

Respectfully submitted,

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